

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
AT&T Petition for Declaratory Ruling that)	WC Docket No. 02-361
AT&T's Phone-to-Phone IP Telephony)	
Services are Exempt from Access Charges)	

Comments of TCA

I. Introduction and Summary

TCA, Inc. - Telcom Consulting Associates ("TCA") hereby submits these comments in response to the Petition for Declaratory Ruling as captioned above. AT&T has requested that the Commission declare 1) Voice over Internet Protocol (VoIP) services carried over the Internet are permanently entitled to subscribe to local services and exempt from any requirement that they subscribe to access services or pay above-cost access charges; and 2) all other phone-to-phone and VoIP telephony services are exempt from access charges unless and until the FCC adopts regulations that prospectively provide otherwise¹.

TCA is a consulting firm that performs financial, regulatory and marketing services for over fifty small, rural local exchange carriers (LEC) throughout the United States. TCA's clients derive a significant portion of their revenues from access charges and therefore will be directly impacted by the FCC's actions in this proceeding. These comments address the concerns of TCA's clients.

TCA urges the Commission to deny AT&T's petition. The Commission should be concerned over AT&T's inconsistency between this filing and public comments it made in 1998. Regardless of previous public positions endorsed, AT&T has failed to prove that its provisioning of long distance (LD) services using IP (Internet Protocol) Telephony is substantially different

¹ AT&T Petition for Declaratory Ruling at page 33.

from other forms of service, from a transmission perspective, and thus, should be afforded the substantially different treatment requested by AT&T. Further, AT&T's petition represents nothing more than a plea to regulators to favor the development of VoIP services at the expense of traditional telecommunications. Finally, this petition clearly consists of nothing more than AT&T's latest attempt to bypass access charges. For these reasons, the Commission should deny AT&T's petition and instead find that phone-to-phone IP and VoIP services are not covered by the ISP/ESP exemption, and are correctly and legally subject to access charges.

II. AT&T's Previous Position

As the Commission is aware, several parties filed comments regarding the Commission's 1998 Report to Congress. AT&T was one of those parties. One of the issues upon which AT&T chose to comment was the issue under scrutiny in this proceeding – whether IP telephony-based services should be subject to access charges and universal service fund assessments. Amazingly, the position AT&T endorsed in 1998 is the polar opposite of what it is requesting of the Commission in the current proceeding. Consider the following statements made in AT&T's comments:

Any Commission failure to enforce USF funding obligations (and access charge assessments) on telecommunications services that are provided over new technology backbones skews the market by making providers of comparable services subject to vastly different payment obligations.²

Moreover, any failure to enforce USF and access charge payment obligations flies in the face of the Commission's commitment to technology-neutral policies, and triggers more artificially-stimulated migration from traditional circuit switched telephony to packet switched IP services that are able to take advantage of this 'loophole'.³

AT&T's eloquent advocacy of circuit switched technology is admirable, as is its indignant portrayal of IP telephony services providers' advantageous use of the ISP/ESP exemption "loophole." Now, however, AT&T would have the Commission approve the use of the "loophole", and condone the market skewing caused by inequitable application of access charges and universal service assessment obligations. AT&T's current petition is a thinly veiled attempt at having the Commission approve what AT&T so vehemently argued against in 1998 –

² AT&T Comments in CC Docket 96-45 (Report to Congress), filed January 26, 1998, at page 12 (emphasis provided)

providing a competitive advantage in the long distance market to those carriers using a certain technology – in this case, IP telephony.

III. Definition of VoIP Service

The underlying basis of AT&T's claim -- that its long distance service utilizing VoIP technology should not be subject to access charges -- is that this service is no different from information services. This claim is patently false. First, AT&T's attempted blurring of the distinction between telecommunications services and information services is in direct conflict with Congress' intent to keep these service definitions mutually exclusive. The FCC agrees that the definitions of telecommunications services and information services are indeed mutually exclusive⁴. In addition, in the FCC's 1998 Report to Congress, the FCC concluded that users of phone-to-phone IP telephony services obtain only "voice transmission"⁵. However, AT&T focuses on the fact that the FCC deferred final determination of this issue⁶, and therefore any attempt to assess access charges on VoIP-based toll is in conflict with the FCC's ISP/ESP exemption. TCA requests that the Commission affirmatively decide that phone-to-phone VoIP service is not an information service, and should be classified as a telecommunications service subject to access charges.

AT&T attempts to blur the lines between its VoIP-based long distance service and the Internet. AT&T argues that IP telephony should be free from access charges in order to comply with the congressional mandate to preserve a free and competitive market for the Internet.⁷ This statement provides a partial quote from 47 U.S.C. §230(b)(2), which also states a "vibrant and free market" exists for "interactive computer services." However, the service that AT&T provides, long distance, simply uses Internet Protocol to route long distance calls, and is not the

³ *Id.* at pages 12-13 (emphasis provided)

⁴ CC Docket No. 96-45, *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress (1998) ("Report to Congress"), at paragraphs 13 ("We conclude, as the Commission did in the *Universal Service Order*, that the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive."), and 43 ("The language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications service and information services as mutually exclusive categories.")

⁵ *Id.* at paragraph 89.

⁶ AT&T Petition at pages 13-14

⁷ *Id.* at p. 5

Internet⁸, nor does AT&T's service ensure a free and competitive market for the Internet or interactive computer services. AT&T is attempting to attach its IP-based long distance service to the unregulated nature of the Internet when clearly the service in question, interexchange toll, is not what Congress intended to be "unfettered by Federal or State Regulation."⁹ If Congress had intended for the long distance market to be unfettered by Federal or State regulation, or other attributes of normal long distance service, it could have easily stated so. IP is simply a technology that "defines the structure of data, or 'packets' transmitted over the Internet."¹⁰ It is important to note the clear distinction between IP, the method of transmission and the Internet, the path of transit. As the Commission itself noted in the 1998 Report to Congress, the technology of IP "is used both over the public Internet and over separate private IP networks."¹¹

AT&T recognizes that toll calls it carries using VoIP experience no net change in format¹², and yet requests treatment similar to that afforded to information services. Under the federal Act, it is clear that what AT&T describes as its service offering is not an information service. Specifically, 47 U.S.C. §153(20) defines information service such that it offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications..." Thus, AT&T's argument that its LD service that uses IP should be treated as an information service should be ignored by the Commission.

IV. Access Charge Issues

AT&T claims that "incumbent LECs have created a controversy over the applicability of interstate access charges to phone-to-phone IP telephony services by engaging in "self-help."¹³ The converse is true – AT&T's never-ending quest to abolish access charges has created controversy through the deliberate confusion it has caused by calling long distance service an information service. The "self-help" incumbent LECs (ILEC) have engaged in is the application

⁸ The Internet is "a loose interconnection of networks belonging to many owners. It is comprised of tens of thousands of networks that communicate using the Internet protocol (IP)." 1998 Report to Congress, paragraph 62.

⁹ 47 U.S.C. § 230(b)(2)

¹⁰ Report to Congress, footnote 124.

¹¹ *Id.* footnote 173.

¹² AT&T Petition at p. 11

¹³ *Id.* at p. 23

and enforcement of Commission-approved tariff provisions. Once AT&T's attempted subterfuge is discovered by an ILEC, and it is determined that interexchange calls are being terminated over local facilities, the ILEC is correct in applying duly authorized access tariff provisions¹⁴. Furthermore, AT&T's claim that access charges are a "tax on the Internet"¹⁵ in the present situation is a blatant, albeit creative, attempt to avoid paying, and what in AT&T's mind are "above cost", access charges. Much to the contrary, the FCC (and state commissions) have yet to abolish access charges, and have indeed set those access charges closer or equal to cost, and in many cases, below cost.

In its petition, AT&T appears to treat Commission-approved access charges assessed by ILECs as a "tax" that should not be imposed on the revenues derived from its VoIP-based long distance service¹⁶. This is a unique claim to make, especially considering AT&T pays originating access charges on many of the calls in question¹⁷ and pays ILECs or CLECs a flat rate charge for local terminating connections¹⁸. Even AT&T is not so bold as to call these charges a "tax", and yet they would have the Commission believe that terminating access charges are a "tax" on the Internet, and will ultimately harm the development of the Internet. Obviously, AT&T treats the costs of originating access (or other service) and terminating local services as costs of doing business; so too should terminating access be treated. Access charges are not a "tax" on the Internet, but are instead an input of AT&T's long distance service that AT&T is attempting to ignore by improperly utilizing local services.

As is normal in many AT&T pleadings, access charges are referred to continually as "above cost". In support of this repetitive claim, AT&T references the FCC's 1997 Access Charge Reform¹⁹ and 1996 Price Cap Performance Review²⁰ orders. These references, while technically correct, are nonetheless misleading. As AT&T is aware, the Commission has issued access reform orders for both price cap and non-price cap carriers since 1997. For non-price cap

¹⁴ It is not disputed that AT&T interexchange toll calls, which happen to be transmitted using IP technology, use the local exchange network in exactly the same way as any other interexchange call (i.e., circuit switched).

¹⁵ *Id.* at p. 6

¹⁶ *Id.*

¹⁷ *Id.* at p. 18

¹⁸ *Id.* at p. 32

¹⁹ *Id.* at p. 7-8

²⁰ *Id.* at p 25

carriers, the Commission's order reforming access charges stated "[w]e align the interstate access rate structure more closely with the manner in which costs are incurred, and create a universal service support mechanism to replace implicit support in interstate access charges with explicit support..."²¹ It is clear that AT&T's reference to prior Commission orders, and ignoring the MAG order, is intended to exaggerate a situation that no longer exists.

AT&T's petition asks the FCC for inconsistent treatment of terminating access charges as compared to originating access charges and universal service fund assessments. AT&T freely admits that it pays originating access to ILECs in certain situations in its provision of IP-based long distance services²², and yet claims that terminating access charges should not be assessed. AT&T also states that it "pays universal service support payments on the revenues from all its non-enhanced VOIP calls that it carries over the Internet and that fall within the definition of phone-to-phone IP telephony and of telecommunications services."²³ This statement is doubly confusing in that 1) it advocates for differing treatment of IP telephony-based long distance service as to universal service fund assessments and access charges, and 2) it claims that the non-enhanced VoIP calls are telecommunications services, and then claims the ISP exemption (for information services) should apply. These glaring inconsistencies should allow the Commission to see AT&T's petition for what it is – the latest attempt in a never-ending quest to rid itself of access charge payments.

V. Public Interest Issues

The Commission must consider public interest issues, especially for customers of rural ILECs, in this proceeding. AT&T, if it has its way, will undoubtedly begin a wave of VoIP-based interexchange services providers, all refusing to pay access charges. Other issues also arise that will directly and adversely impact the public interest. Regardless of AT&T's obvious goal in filing this petition, the lowering of its cost of service, the Commission must consider the overall public interest, because it is the public that will pay if AT&T's petition is granted.

²¹ CC Docket No. 00-256, *In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, at ¶3 ("MAG Order")

²² AT&T Petition at p. 18

AT&T is, in essence, asking the Commission to favor the development of IP telephony-based services at the expense of local customers and rural LECs. If AT&T's request is granted, substantial amounts of interexchange toll usage will be terminated over local connections, thereby substituting usage sensitive access rates with flat rate local charges. This occurrence will have adverse affects on rural ILECs and their customers as cost recovery problems arise. The Commission, in the interest of rural LEC customers, should reject AT&T's plea to assist the "nascent" VoIP market (which is, in reality, nothing more than the long distance market) at the expense of rural LEC customers.

The Commission should also consider AT&T's petition as being harmful to the long distance services market. AT&T claims it owns and operates one of the world's largest "common" Internet backbone facilities²⁴, over which it carries its VoIP-based long distance traffic²⁵. Through this petition, AT&T is requesting relief from paying access charges as "affirmative economic savings"²⁶ before it will invest further in IP telephony-type technologies. However, AT&T has not addressed, in their current petition, the impact their ownership and further investment in IP telephony will have on its competitors that may not have the same access to the common Internet backbone.²⁷ Further, AT&T's petition, if granted, would give AT&T an unfair advantage in the long distance market over those competitors who do not use VoIP to carry long distance traffic.

As mentioned above, AT&T claims that allowing ILECs to charge access on VoIP-based long distance usage would adversely impact the growth and free market nature of the Internet. TCA states that the opposite is true – RLEC access revenues will aid the development of the Internet in rural areas. As recognized by the FCC, access revenues are an "important revenue stream for rate-of-return carriers."²⁸ RLECs utilize this important revenue stream to, among other things, invest in broadband-capable infrastructure allowing customers in rural areas to

²³ *Id.* at p. 32-33

²⁴ *Id.* at p. 8

²⁵ *Id.* at p. 3

²⁶ *Id.* at p. 17-18

²⁷ AT&T did address this impact in their comments regarding the FCC's 1998 Report to Congress (p. 12): "*Nowhere is this inequity more blatant than in the case of phone-to-phone telecommunications services that use Internet Protocol ("IP") technology in their long-haul networks...*"

²⁸ *MAG Order* at ¶ 12

better enjoy the benefits of high-speed Internet access. These capabilities will in turn stimulate investment in Internet-based services. In this regard, AT&T's request is in direct conflict with the public interest in rural areas of the United States.

VI. Cost Recovery Issues

AT&T claims that "the adoption of a rule that ratifies the longstanding *de facto* ISP exemption for all VOIP services will cause no recognizable harm to incumbents..."²⁹ AT&T is incorrect in stating no harm will occur to the rural LECs, and furthermore, harm will also occur to customers of rural LECs.

If granted, AT&T's petition will allow it to continue, and increase, the shift of network usage from toll to local. This is due to the fact that AT&T's VoIP-based long distance service terminates long distance calls over local ILEC facilities, for which AT&T pays, in most cases, a flat rate monthly charge. This shift in network usage, and corresponding reduction in access charge revenues, will result in higher local rates. Thus, rural ILEC customers will bear the burden of AT&T's desired termination of toll traffic using local ILEC facilities. This result is neither equitable or in the public interest.

VII. Conclusion

It is undisputed that the FCC's refusal to allow LECs to impose access charges on information services has protected the Internet services industry and aided in its growth; however, the FCC has not protected the telephone industry from faux-information service providers such as AT&T portrays itself in its petition. AT&T's petition asks for relief where relief is not needed, and attempts to classify its long distance service, which uses IP telephony as the transmission technology, as an information service. The long distance market is not "nascent", and thus should not be afforded the protections offered to the once-nascent Internet industry by Congress.

The Commission should be suspicious of AT&T's position reversal in public policy advocacy. In 1998, AT&T argued against providing long distance carriers that use IP telephony

technology in long-haul networks any advantage through elimination of access charges and universal service fund assessment payments. In its current petition, AT&T argues the opposite position. The Commission should reject this obvious reversal in position as an attempt by AT&T, who now obviously considers IP-based long distance service differently than it did in 1998, to gain an unfair advantage over its competition.

TCA requests the Commission affirmatively find that all long distance services, regardless of the transmission technology utilized, are subject to originating and terminating access charges. Further, the Commission should find that IP telephony-based long distance services, such as the phone-to-phone service described by AT&T, is properly subject to the tariffed interstate and intrastate access charges at the same level, structure, and terms as all other long distance services.

Respectfully submitted,

[electronically filed]

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²⁹ AT&T Petition at p. 32